No. 95-1479

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WHEREHOUSE ENTERTAINMENT, INC.; LOUIS A. KWIKER; GEORGE A. SMITH; MICHAEL T. O'KANE; LAWRENCE K. HARRIS; DONALD E. MARTIN; JOEL D. TAUBER; FURMAN SELZ MAGER DIETZ & BIRNEY, INC.; WEI ACQUISITION CORP.; WEI HOLDINGS, INC.; and ADLER & SHAYKIN,

Petitioners,

—v.—

MCMAHAN & COMPANY; FROLEY, REVY INVESTMENT CO., INC.; WECHSLER & KRUMHOLZ, INC.; and DON THOMPSON, on behalf of himself and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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Questions Presented

1. Did the Court of Appeals correctly hold that plaintiff debentureholders could receive "benefit-of-the-bargain" damages on their claims under § 10(b) of the Exchange Act if such damages could be proven "with a reasonable degree of certainty" at trial?

2. Is the Court of Appeals' decision consistent with the doctrine of "loss causation"?

Statement Pursuant to Rule 29.6

Respondent Froley, Revy Investment Co., Inc. is wholly owned by Southwest Asset Management Co. None of the other corporate respondents has a parent corporation or a non-wholly owned subsidiary.

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Introduction

This action involves the refusal of Defendant Wherehouse Entertainment, Inc. ("Wherehouse") to honor a special debenture redemption feature touted in the debenture Prospectus and in sales meetings as a "special protection" for debentureholders. The Debentureholders, respondents here, allege that Defendants' written and oral representations of that redemption feature were false and misleading. The Defendants seek review of a decision by the United States Court of Appeals for the Second Circuit holding that the Debentureholders may seek a "benefit-of-the-bargain" measure of damages if such damages can be established "with a reasonable degree of certainty" at trial. That trial is currently scheduled to commence on August 5, 1996.[1]

This Court denied Defendants' petition for *certiorari* to review the Second Circuit's prior decision in this case, which held that the Debentureholders had stated a claim for securities fraud and noted that "there is merit in plaintiffs' contentions that the . . . representations of [the redemption feature] in the offering materials were misleading." *McMahan & Co. v. Wherehouse Entertainment, Inc.*, 900 F.2d 576, 580 (2d Cir. 1990), *cert. denied*, 501 U.S. 1249 (1991) ("*McMahan I*") (91a).[2] Defendants have not shown any reason for the Court to review yet another interlocutory order in this case.

The Petition purports to find conflicts concerning damages and the doctrine of "loss causation," but does so only by misrepresenting the decision of the Second Circuit and the Debentureholders' claims. The Second Circuit's decision on "benefit-of-the-bargain" damages is in accord with the prece-

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[1] The District Court denied Defendants' motion for a stay of the proceedings on February 13, 1996.

[2] References to the Appendix to Defendants' Petition for a Writ of *Certiorari*, dated March 14, 1996 (the "Petition") are cited "___ a."

dents of this Court, which recognize that the deterrent goals of the Exchange Act require a flexible view of damages. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Randall v. Loftsgaarden*, 478 U.S. 647 (1986). The Debentureholders' claims satisfy the requirement of "loss causation" since the Debentureholders' injury—their inability to redeem their debentures at the promised price—results directly from Defendants' misrepresentation of the redemption feature.

This case meets none of the criteria for an award of *certiorari*. No important question of federal law is at issue here. In addition, the interlocutory nature of the Second Circuit's most recent decision is reason alone to deny the Petition. If the Court has any inclination to address the legal issues raised by the Petition, it would be better served by doing so upon a complete factual record after trial.

Statement of the Case

The Petition's many distortions of the facts require a detailed explanation of the Debentureholders' claims.

The Holder's Right to Tender

Respondents are three institutional investors and a certified class of all other investors who purchased convertible debentures issued by Wherehouse in the initial public offering in July 1986 and afterwards. Those 6¼ percent debentures were issued in July 1986 and were due in July 2006. They were convertible into Wherehouse common stock at a fixed price. (J.A. 270).[3] The long-term conversion feature, which was the chief economic benefit of the investment, would be nullified if Wherehouse's common stock no longer existed upon a merger into another company.

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[3] References to the Joint Appendix filed in the court below are cited "J.A. ___."

Wherehouse understood that Debentureholders wanted protection from changes in control. (J.A. 1008). The debenture indenture (the "Indenture") consequently provided a special covenant, the "Holder's Right to Tender," which requires (or appears to require) Wherehouse to redeem debentures, at the "option" of each "holder," at a specified premium over par value in the event of certain mergers or highly leveraged transactions.

> *Holder's Right to Tender*. The Holder of any Security or Securities *shall have the right*, at his option, upon the giving of notice of the occurrence of any event described in Section 5.02 . . . to tender for redemption any such Security or Securities . . . . (J.A. 227) (emphasis added).

The Indenture further provides that the "right to tender . . . shall be triggered" under any of three circumstances: (i) if a person or group attains ownership of 80 percent of Wherehouse stock entitled to vote, (ii) if Wherehouse merges with another company, or (iii) if Wherehouse incurs debt in excess of 65 percent of its capitalization. Upon the occurrence of any of these three triggering events, the Indenture provides that the Right to Tender is exercisable "unless approved" by Wherehouse's "Independent Directors," a term separately defined for purposes of this provision of the Indenture. (J.A. 228-29). In the words of the Second Circuit, this terminology "could reasonably be understood to mean that in the case of a triggering event, the right to tender would arise *unless* the Independent Directors find the event to be in the interests of the debentureholders." (91a) (emphasis in original). The Holder's Right to Tender thus appears to permit Debentureholders to redeem their debentures at a premium in the event of certain mergers or other highly leveraged transactions, thereby protecting them from transactions that would be harmful to their interests.

The Prospectus marketed the Holder's Right to Tender as a valuable aspect of the debenture offering, identifying the pro-

vision on its cover page and, under the heading "Optional Tender," in the Prospectus Summary. (J.A. 270, 273). The record establishes that Defendants knew that by putting the right to tender in the Prospectus Summary, it would be considered a "major deal point[ ]" of the offering, *i.e.*, one of the items that "an investor . . . would be looking for."[4] The offering's underwriter, Defendant Furman Selz Mager Dietz & Birney, Inc. ("Furman Selz") orally touted the covenant as "special extra protection for the bondholders."[5] As the Second Circuit held in *McMahan I*:

> the offering materials can reasonably be read to present the option to tender as a valuable right. (89a).

Each of the Plaintiffs read the Prospectus and relied upon its description of the "Optional Tender" in making their purchases. *See*, *e.g.*, J.A. 1068. Plaintiff Froley, Revy Investment Co., Inc. ("Froley, Revy") purchased $3.245 million of debentures in the initial offering, paying the full face value of $1,000 per bond. (J.A. 602-06). When the market value of the debentures later fell, the right to tender provision became all the more important to the Debentureholders, for the likelihood of (and damage from) a possible takeover was increased. In the words of one of the principals of Froley, Revy:

> [T]his put provision became more and more important to the investment as the common stock declined from the price at the time we purchased it. . . . And to the best of my recollection, we felt that this put provision would help us keep our investment in the company and not be frozen out by a low-priced takeover offer. (J.A. 974-75).

Contrary to Defendants' assertion, there is no evidence in the record that the Debentureholders' secondary market

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[4] J.A. 1108-09. *See also* J.A. 1012-14; 988-90; 1045; 1117; 970-71.

[5] J.A. 1073-75; 1079-82; 1086-88.

purchases were primarily motivated by the debentures' effective interest rate. (Petition at 2). Rather, the record shows that Plaintiffs were "averaging down" the costs of their investment. (J.A. 974).

Defendants' Intent to Mislead

Pretrial discovery confirmed that although Defendants promoted the Optional Tender as a valuable right in the Prospectus and orally, they never intended that it actually protect the Debentureholders. In the words of Wherehouse's then-Chairman:

> Q. Was it the intention of the Wherehouse board of directors that this provision provide protection to debentureholders?
>
> * * *
>
> A. *It was not my intention to provide protection to the debentureholders.* It was my intention to provide anti-takeover protection for the Wherehouse.

(J.A. 1000) (emphasis added). Furman Selz and the other Wherehouse directors also believed that the Holder's Right to Tender was nothing more than a takeover bargaining device—a disincentive to an unwanted suitor that was waivable at Wherehouse's will—instead of genuine protection for the Debentureholders.[6] Defendants' view was nowhere disclosed to the Debentureholders in the offering materials. Nor did the Defendants identify the provision as a "Poison Put," the pejorative term now used in their Petition.

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[6] J.A. 959-62; 1036-40; 990-92. *See also* J.A. 1027-28 (Wherehouse director Smith described Right to Tender as "generic takeover defense").

Wherehouse Ignored the Debentureholders' Interests in Waiving the Right to Tender.

On October 12, 1987, fifteen months after issuing the debentures, Wherehouse received a letter from Shamrock Holdings, Inc. ("Shamrock"), proposing a Shamrock takeover of Wherehouse. (J.A. 645-46). Wherehouse rejected the overture, saying that "the Company's business and prospects would be severely impaired by a leveraged acquisition." (J.A. 824-25).

One month later, Shamrock launched a hostile takeover bid for Wherehouse. (J.A. 651). Wherehouse's investment bankers contacted Adler & Shaykin, a leveraged buy-out firm, to see if it was interested in serving as a "white knight." Adler & Shaykin reviewed the Wherehouse Indenture and asked its lawyers to look at it "carefully." (J.A. 914-15; 1056; 1062). Adler & Shaykin and Wherehouse also discussed the Holder's Right to Tender and agreed that Wherehouse would not redeem the debentures upon a transaction with Adler & Shaykin. (J.A. 1101-04).

In response to the Shamrock bid, on December 20, 1987, less than 18 months after it issued the debentures, the Wherehouse Board accepted Adler & Shaykin's proposal at $14 per share. (J.A. 724). This leveraged buy-out and merger involved all three of the harmful events triggering the Holder's Right to Tender.

The transaction was plainly not in the interests of the Debentureholders. It is undisputed that the Independent Directors never met to consider the Debentureholders' interests or whether the Holder's Right to Tender the debentures should be waived. Nor, apparently, were the Debentureholders ever discussed by the full Wherehouse Board, apart from one exchange recorded in the minutes of a Board meeting:

> [Wherehouse's Chairman] asked whether there would be any effect on the holders of the Company's outstanding

> debentures if the Company was to accept one proposal over the others. [Furman Selz] stated that [it] believed that by agreeing to enter into a merger agreement, none of the current proposals [including Shamrock's] would be deemed to be a hostile transaction under the debenture indenture and accordingly that it would not make any difference to the debentureholders which proposal was accepted by the Board. (J.A. 722).

As these minutes made clear, even Shamrock's hostile bid would not, in Defendants' view, "be deemed to be a hostile transaction under the debenture indenture." This seemingly illogical outcome is the natural result of Defendants' position: under Defendants' view of their obligations, the Independent Directors always would waive the "Right to Tender," once the success of a "hostile" bid seemed likely, in order to get a higher price for the shareholders.

Three days after this Board meeting, Wherehouse first disclosed that the Debentureholders would not be permitted to exercise the Holder's Right to Tender in connection with the Adler & Shaykin merger. (J.A. 839). After the merger, each $1,000 face value debenture lost its equity conversion feature, and was convertible only into $507.22 cash. (J.A. 733). Had the Debentureholders been permitted to tender their debentures at par plus 6.25%, as promised in the Prospectus, they would have received over twice as much, or $1,062.50 for each debenture. (J.A. 293). Overall, the net effect was a significant windfall to Wherehouse; rather than repaying the Debentureholders the full $50 million it had borrowed from them at a low interest rate in 1986, Wherehouse paid barely half that amount.

The Proceedings Below

The *McMahan* action was commenced after the announcement of the Adler & Shaykin merger, on January 15, 1988. (J.A. 18-37). Plaintiff Thompson brought his action on behalf

of the rest of the Debentureholders on December 21, 1988. (J.A. 51-73).

Debentureholders seek as damages the difference between the amount they were offered upon consummation of the Adler & Shaykin takeover and the amount they would have been entitled to receive in accordance with the Holder's Right to Tender, absent Defendants' fraud. That relief is nothing more than enforcement of the remedy expressly promised by Wherehouse's own Prospectus, not insurance against "the risk of general market fluctuation," as the Petition claims. (Petition at 14). Nor do the Debentureholders allege "that the market price of [the debentures] was artificially inflated by alleged misrepresentations in the disclosure documents." (Petition at 10).[7]

After the close of discovery, Defendants moved for summary judgment arguing, *inter alia*, that they had established the statutory defense of "negative causation" under § 11 of the Securities Act of 1933, 15 U.S.C. § 77k, and that the Debentureholders could not prove loss causation under § 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b). The District Court denied this motion with respect to the Debentureholders' securities law claims. Specifically, as to the § 10(b) claims, the District Court held that under *Osofsky v. Zipf*, 645 F.2d 107 (2d Cir. 1981) the Debentureholders could "be 'compensated for economic loss suffered as a result of wrongs committed in violation of the 1934 Act, whether the measure of those compensatory damages be out-of-pocket loss, the benefit of the bargain, or some other appropriate standard.' " (36a) (quoting *Osofsky*). In *Osofsky*, the Second Circuit had held that Plaintiffs could seek

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[7] The *McMahan* complaint makes no reference to "artificial inflation" in the price of the debentures. Although the *Thompson* complaint does refer to inflation of the market price of the debentures, Plaintiff Thompson did not rely on that allegation in the proceedings below.

benefit-of-the-bargain damages to enforce promises made in connection with a tender offer.[8]

On appeal, the Second Circuit reversed the District Court's ruling with respect to the § 11 claims, holding that the statutory cap contained in § 11(e) precluded the award of benefit-of-the-bargain damages on those claims. As to the § 10(b) claims, the Second Circuit noted that it had previously permitted benefit-of-the-bargain damages under the Exchange Act, and observed that "the key to awarding benefit-of-the-bargain damages is the degree of certainty to which that can be established." (12a). The Circuit Court went on to hold that the Debentureholders could receive benefit-of-the-bargain damages under § 10(b) of the Exchange Act if they can prove their theory of injury "with a reasonable degree of certainty." (13a).

Contrary to Defendants' mischaracterization of the decision, the Second Circuit did not permit the award of damages "without regard to whether the misrepresentation in fact caused any loss to plaintiff." (Petition at 13). The decision below plainly requires that the Debentureholders prove a causal nexus between Defendants' misrepresentations and the Debentureholders' inability to exercise the Holder's Right to Tender: "if plaintiffs could establish, under their theory of the case, that independent directors, acting on behalf of the debentureholders, would not have approved this merger, then damages could be assessed at the promised redemption of par plus 6.25%." (13a).

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[8] The District Court also denied Defendants' motion to dismiss the securities claims on the ground of a boilerplate "no action" clause in the Indenture, holding that "as a matter of law, 'no action' clauses in indentures or securities may not be used as a defense to federal securities claims." (34a). The Second Circuit affirmed that ruling on appeal. (16a).

Reasons the Petition Should Be Denied

I. The Second Circuit's Ruling on Damages Is Consistent with the Precedents of this Court and the Other Circuits.

The decision below holds that benefit-of-the-bargain damages are available to the Debentureholders on their § 10(b) claims if, at trial, such damages can be established "with reasonable certainty." (13a). That decision accords fully both with the decisions of this Court and with the decisions of other courts that have considered similar fraud claims.

This Court has recognized that the damages awarded in civil fraud actions brought pursuant to § 10(b) are not confined to "out-of-pocket" losses, as Defendants submit, but must be fashioned flexibly to deter fraud. In *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155-56 (1972), this Court expressly approved disgorgement of defendants' profits—a remedy that resulted in compensation far in excess of plaintiffs' out-of-pocket losses. Several years later, this Court reiterated that "the mere fact that [a remedy] may place a § 10(b) plaintiff in a better position than he would have been in absent the fraud, does not establish that the flexible limits of § 28(a) [permitting plaintiffs to recover their "actual damages"] have been exceeded." The goal is deterrence:

> Congress intended to deter fraud and manipulative practices in the securities markets, and to ensure full disclosure of information material to investment decisions. This deterrent purpose is ill served by a too rigid insistence on limiting plaintiffs to recovery of their "net economic loss."

Randall v. Loftsgaarden, 478 U.S. 647, 663-64 (1986).

In these cases, restricting the Debentureholders to recovery of their "out-of-pocket" losses would effectively insulate the Defendants, who made the fraudulent misrepresentations, from the full consequences of their wrongdoing—promising

a special protection they had no intention of providing. Benefit-of-the-bargain damages are required in cases such as these to deter issuers and underwriters from misrepresenting contract rights in connection with debenture offerings.

Contrary to Defendants' contention, the Second Circuit is not the only one to permit the award of benefit-of-the-bargain damages to securities purchasers. In *John R. Lewis Inc. v. Newman*, 446 F.2d 800, 805 (5th Cir. 1971), for example, plaintiffs bought unregistered shares of stock in reliance on a promise that they would have the right to exchange them for registered shares six months later; when the defendant failed to abide by his promise, the court approved an award of damages based upon the value of the promised exchange.[9] The Seventh Circuit, which Petitioners mistakenly claim prohibits benefit-of-the-bargain damages in § 10(b) actions, acknowledges that "the court's function is to fashion the remedy best suited to the harm." *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1240-41 (7th Cir. 1988) (citing, with approval, *Osofsky* and *Hackbart*).

The cases Defendants cite, which confine plaintiffs to recovery of their out-of-pocket losses, are all inapposite. Two of them do not address claims for benefit-of-the-bargain damages at all. *See Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990); *Sharp v. Coopers & Lybrand*, 649 F.2d 175 (3d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982). In the other two cases, the damages were either too speculative or too causally remote from the fraud to justify such an

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[9] Other cases in which purchasers have been permitted to seek benefit-of-the-bargain damages are: *Hackbart v. Holmes*, 675 F.2d 1114, 1121 (10th Cir. 1982); *Rudinger v. Insurance Data Processing, Inc.*, 778 F. Supp. 1334, 1339-40 (E.D. Pa. 1991); *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*. No. 87 C. 9853, 1989 WL 134846 (N.D. Ill. Oct. 19, 1989); *Lee v. Levenfeld*, No. 81 C. 4493, 1987 U.S. Dist. LEXIS 1458 (N.D. Ill. Feb. 23, 1987); *Redstone v. Goldman, Sachs & Co.*, 583 F. Supp. 74, 76 (D. Mass. 1984); and *Dofflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372, 380-81 (D. Del. 1983).

award. *See Stone v. Kirk*, 8 F.3d 1079, 1087 (6th Cir. 1993) (declining to award compensation for disallowed tax benefits when fraud related to misrepresented commissions and court found "considerable force" in defendant's claim that he did not expect unfavorable IRS treatment); *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1551 (7th Cir. 1990) (alleged losses in purchase of business were "implausible" and suggested "double counting"). None of these cases concerned misrepresentations of a contractual right that the defendant had the power and obligation to honor. Here, by contrast, Wherehouse had the authority to honor the Holder's Right to Tender promised to Debentureholders in the Prospectus. It is, therefore, entirely appropriate to require Defendants to perform their supposed promise as the cost of their fraudulent misrepresentations.

II. The Decision Below is Consistent with Holdings of the Second Circuit and Other Circuits on "Loss Causation."

The decision below does not even mention the issue of "loss causation" on which Defendants base their Petition. Defendants appear to believe that the Second Circuit's actual holding—that "benefit-of-the-bargain" damages were available to the Debentureholders on the facts of this case—somehow abrogates the judicially-created doctrine of "loss causation." The decision below is, however, fully consistent with the requirement of "loss causation" imposed on § 10(b) claims by the various circuits.

Even the cases on which Defendants rely acknowledge that "loss causation" is just another term for the "tort concept of proximate cause," meaning that the "plaintiff must prove that the damage suffered was a foreseeable consequence of the misrepresentation." *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1495 (2d Cir. 1992).[10] The "damage suffered" by the

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[10] *See also McGonigle v. Combs*, 968 F.2d 810, 821 (9th Cir.) (loss causation is "analogous to the basic tort principle" of proximate cause),

Debentureholders is their inability to cause Wherehouse to redeem their debentures at the premium listed in the Prospectus. Under fundamental precepts of proximate cause, it is not merely "foreseeable" but inevitable that such damage would result from Defendants' repudiation of the Holder's Right to Tender in a merger.

Defendants argue as though there were only one way of proving loss causation: "*i.e.*, that [Plaintiffs must prove that] the alleged misrepresentations artificially inflated the market price of [Plaintiffs'] securities." (Petition at 8). While this principle may govern if a plaintiff alleges artificial inflation in a security's price—as in the cases cited at pages 11-13 of the Petition—it has no bearing here because Debentureholders do not rely on such allegations. There is, therefore, no need to establish a proximate causal connection between Defendants' misrepresentations and the market price of the debentures.

The Petition is premised upon the faulty assumption that the Second Circuit has abandoned the doctrine of "loss causation." Although this doctrine was not expressly addressed in the decision below, the Second Circuit has repeatedly emphasized that it demands a proximate causal connection between an alleged fraud and the injury in cases arising under § 10(b).[11] There is no inconsistency between the Second Circuit's decisions and *Bastian v. Petren Resources Corp.*, 892

cert. dismissed sub nom. Casares v. Spendthrift Farm, ___ U.S. ___, 113 S. Ct. 399 (1992); *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir.) (loss causation is an "exotic name" for "the standard rule of tort law"), *cert. denied*, 496 U.S. 906 (1990).

[11] *See Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1495 (2d Cir. 1992) (dismissing fraud claims for lack of loss causation because plaintiff failed to prove that "the misrepresentation was the cause of the actual loss suffered"); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 967 F.2d 742, 747 (2d Cir. 1992) ("to satisfy the causation element requires a showing that the violation caused plaintiff's economic loss"); *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.*, 985 F.2d 102, 104 (2d Cir. 1993) (loss causation demands a showing of foreseeability).

F.2d 680 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990) or *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983). Indeed, the Second Circuit has cited approvingly to both of those decisions in dismissing claims for failure to establish loss causation. *See, e.g.*, *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 728 (1995) (relying on *Bastian*); *Citibank*, 968 F.2d at 1495 (same); *Litton Indus.*, 967 F.2d at 747 (relying on *Huddleston*).

Apart from their misreading of the decision below, Defendants' chief authority for contending that the Second Circuit parts company with other circuits on the issue of loss causation is the 16-year-old decision in *Marbury Management, Inc. v. Kohn*, 629 F.2d 705 (2d Cir.), *cert. denied sub nom. Wood Walker & Co. v. Marbury Management, Inc.*, 449 U.S. 1011 (1980). *Marbury*, which was not cited in the decision below, is no basis for a writ of *certiorari* here. Courts and commentators—including Defendants' counsel—have noted that *Marbury* represents a very particularized exception to ordinary loss causation requirements in cases alleging broker churning. *See, e.g.*, Dennis J. Block & Jonathan M. Hoff, *Section 10(b)'s Loss Causation Requirement*, N.Y.L.J. 5, 6 (Sept. 17, 1992) (noting that the Second Circuit has confined *Marbury* to its facts); Andrew L. Merritt, *A Consistent Model of Loss Causation in Securities Fraud Litigation*, 66 Tex. L. Rev. 469, 480 & n.49 (1988); *Bastian v. Petren Resources Corp.*, 681 F. Supp. 530, 535 (N.D. Ill. 1988) ("courts [such as *Marbury*] which have rejected a 'loss causation' requirement have done so in cases involving a particular and special form of § 10(b) violation—stock broker 'churning' of client accounts"), *aff'd* 892 F.2d 680. The 16-year-old *Marbury* decision does not justify an examination of the circuits' uniform requirement of loss causation for § 10(b) claims.[12]

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[12] Defendants also suggest that this Court should grant a writ of *certiorari* because of alleged intracircuit confusion over the meaning of

III. The Petition Raises No Important Issue of Federal Law.

As shown above, the decision below presents no important issue of federal law. Indeed, the Petition itself concedes that benefit-of-the-bargain damages are awarded only in "exception[al]" cases that are "practically unimportant". (Petition at 16 (quoting Frank H. Easterbrook & Daniel R. Fischel, *Optional Damages in Securities Cases*, 52 U. Chi. L. Rev. 611, 630 (1985))). Because the issues raised are not of general importance, the Petition should be denied.

Contrary to Petitioner's contention (Petition at 8-10), this case does not implicate the interpretation of the newly passed Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995). That statute does not apply to these cases, which were already pending when the statute became law on December 22, 1995. *See id.* at § 108. Moreover, the so-called "bounce-back" provision of the new law applies only to cases asserting a fraud-on-the-market theory, on which the Debentureholders do not rely. *See id.* at § 101(b) (bounce-back provision applies in cases "in which the plaintiff seeks to establish damages by reference to the market price of a security."); H.R. Rep. No. 50, 104th Cong., 1st Sess., pt. 1 at 66 (Feb. 24, 1995) (noting that predecessor provision of House bill "has been amended to apply only to fraud-on-the-market cases") (minority views).

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loss causation. (Petition at 7 & n.6). However, as demonstrated above, the Second Circuit's rulings exhibit no confusion on the issue of loss causation. Even if there were internal disagreement, it would not justify a writ of *certiorari*. *See Davis v. United States*, 417 U.S. 333, 340 (1974) ("decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the court of Appeals itself"); Robert L. Stern *et al.*, *Supreme Court Practice* 204-05 (6th ed. 1986) ("Ordinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari.").

Petitioners suggest that their Petition raises important issues of federal law because the Second Circuit granted leave for an interlocutory appeal. (Petition at 6). No such inference is justified here. The District Court certified three issues for interlocutory review, including the effect of the Indenture's boilerplate "no action" clause on the Debentureholders' right to bring securities fraud claims—an issue on which the Securities and Exchange Commission submitted an *amicus* brief in support of the Debentureholders' position. As noted in the leading treatise on this Court's practice, "nothing in the Interlocutory Appeals Act itself or in its legislative history suggests that the [Supreme] Court should depart from its usual rules respecting review of interlocutory judgments." *Supreme Court Practice*, at 227.

IV. There Has Been No Final Judgment.

Ordinarily, lack of finality itself is "sufficient ground for the denial of the application" for a writ of *certiorari*. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Id. See also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893) (discretionary review of interlocutory orders should be denied unless "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

This salutary rule is particularly applicable here. No damages have yet been awarded. The central holding challenged in the Petition—whether Debentureholders may seek benefit-of-the-bargain damages—hinges on the Debentureholders' ability to prove such damages "with a reasonable degree of certainty" at trial. That issue can best be addressed upon a complete factual record after trial.

Conclusion

For all of the foregoing reasons, the Petition should be denied.

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